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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

EPA-R08-OAR-2011-0562; FRL-9905-67-Region 8

Approval and Promulgation of Air Quality Implementation Plans; State of Colorado; Revised Transportation Conformity Consultation Process

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is approving a State Implementation Plan (SIP) revision submitted by the State of Colorado on May 11, 2012. The May 11, 2012 submittal addresses updates to Regulation Number 10 “Criteria for Analysis of Conformity” of the Colorado SIP including revisions to transportation conformity requirements, transportation conformity criteria and procedures related to interagency consultation, and enforceability of certain transportation related control and mitigation measures. The submittal also removes certain provisions from the SIP so that federal rules will govern conformity of general federal actions. EPA is approving the submission in accordance with the requirements of the Clean Air Act (CAA).

DATES: This final rule is effective [insert date 30 days after publication in the FEDERAL REGISTER].

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA-R08-OAR-2011-0562. All documents in the docket are listed in the www.regulations.gov index. Although listed in the index, some information is not publicly available, e.g., Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be

publicly available only in hard copy. Publicly available docket materials are available either electronically through www.regulations.gov or in hard copy at the Air Program, Environmental Protection Agency (EPA), Region 8, 1595 Wynkoop Street, Denver, Colorado 80202-1129.

EPA requests that if at all possible, you contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section to view the hard copy of the docket. You may view the hard copy of the docket Monday through Friday, 8:00 a.m. to 4:00 p.m., excluding Federal holidays

FOR FURTHER INFORMATION CONTACT: Tim Russ, Air Program, Mailcode 8P-AR, Environmental Protection Agency, Region 8, 1595 Wynkoop Street, Denver, Colorado 80202-1129, telephone number (303) 312-6479, fax number (303) 312-6064, or email russ.tim@epa.gov.

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Definitions

For the purpose of this document, the following definitions apply:

- (i) The word Act or initials CAA mean or refer to the Clean Air Act, unless the context indicates otherwise.

- (ii) The words EPA, we, us or our mean or refer to the United States Environmental Protection Agency.
- (iii) The initials NAAQS mean national ambient air quality standard.
- (iv) The initials SIP mean or refer to State Implementation Plan.
- (v) The words State or Colorado mean the State of Colorado, unless the context indicates otherwise.

I. Background

EPA is approving revisions to Colorado's Regulation Number 10, "Criteria for Analysis of Conformity," (hereafter, "Regulation No. 10") of the Colorado SIP that address transportation conformity SIP requirements of section 176(c) of the CAA and Title 40, part 51.390(b) of the Code of Federal Regulations (CFR). Specifically, a conformity SIP must address the following transportation conformity requirements: 40 CFR 93.105, which formalizes the consultation procedures; 40 CFR 93.122(a)(4)(ii), which addresses written commitments to control measures that are not included in a metropolitan planning organization's transportation plan and transportation improvement program (TIP) that must be obtained prior to a conformity determination; and 40 CFR 93.125(c), which addresses written commitments to mitigation measures that must be obtained prior to a project-level conformity determination.¹

EPA notes that the State submitted prior SIP revisions to Regulation No. 10 by a letter dated June 18, 2009. The June 18, 2009 SIP submittal addressed revisions to numerous aspects and sections in Regulation No. 10. Those prior revisions to Regulation No. 10 are contained in

¹ A conformity SIP includes a state's specific criteria and procedures for certain aspects of the transportation conformity process consistent with the federal conformity rule. A conformity SIP does not contain motor vehicle emissions budgets, emissions inventories, air quality demonstrations, or control measures. See EPA's *Guidance for Developing Transportation Conformity State Implementation Plans (SIPs)* for further background: www.epa.gov/otaq/stateresources/transconf/policy/420b09001.pdf.

the May 11, 2012 revisions to Regulation No. 10. In addition to further clarifying transportation conformity consultation procedures, the May 11, 2012 revision responded to changes in federal law by removing SIP provisions related to general conformity.

EPA had initially determined that the June 18, 2009 revisions to Regulation No. 10 were fully approvable. As EPA has determined that the May 11, 2012 revisions to Regulation No. 10 are also fully approvable, we are, therefore, only acting on the May 11, 2012 Regulation No. 10 revisions as they supersede and replace the June 18, 2009 revisions. By approving these May 11, 2012 revisions to Regulation No. 10, EPA will be making them part of the federally enforceable SIP for Colorado under the CAA. EPA also notes that the May 11, 2012 SIP submission is also intended to revise and supersede the conformity SIP that was previously approved by EPA in 2001 (66 FR 48561).

Our November 12, 2013 notice of proposed rulemaking (78 FR 67327) invited comment on our proposal and provided a 30-day comment period. The comment period ended on December 12, 2013. We did not receive any comments. Accordingly, we are finalizing our actions as proposed.

II. What is the State's Process to Submit SIP Revisions to EPA?

Section 110(k) of the CAA addresses our actions on submissions of revisions to a SIP. The CAA requires states to observe certain procedural requirements in developing SIP revisions for submittal to us. Section 110(a)(2) of the CAA requires that each SIP revision be adopted after reasonable notice and public hearing. This must occur prior to the revision being submitted by a state to us.

With regard to the prior June 18, 2009 revisions to Regulation No. 10, the Colorado Air Quality Control Commission (AQCC) held a public hearing for those revisions on November 20,

2008. There were no public comments. The AQCC adopted the revisions to Regulation No. 10 directly after the hearing. This SIP revision became state effective on December 30, 2008, and was submitted by James B. Martin, on behalf of the Governor, to us on June 18, 2009.

For the May 11, 2012 revisions to Regulation No. 10, the AQCC held a public hearing for those revisions on December 15, 2011. There were no public comments. The AQCC adopted the revisions to Regulation No. 10 directly after the hearing. This SIP revision became state effective on January 30, 2012 and was submitted by Christopher E. Urbina, on behalf of the Governor, to us on May 11, 2012.

We have evaluated the Governor's May 11, 2012 submittal for Regulation No. 10 and have determined that the State met the requirements for reasonable notice and public hearing under section 110(a)(2) of the CAA. By operation of law under section 110(k)(1)(B) of the CAA, the Governor's May 11, 2012 submittal was deemed complete on November 11, 2012.

III. EPA's Evaluation of the State's May 11, 2012 Submittal

EPA has reviewed the revisions to Regulation No. 10, which is Colorado's Transportation Conformity Consultation (Conformity SIP) element of the SIP, that were submitted by the Governor on May 11, 2012 and we have found that our approval is warranted. We reviewed the State's submittal for consistency with the conformity requirements in 40 CFR 51.390(b), that establish the requirements for conformity consultation SIPs, and with the conformity requirements in 40 CFR sections 93.105, 93.122(a)(4)(ii), and 93.125(c).^{2,3} We also

² "40 CFR 93 Transportation Conformity Rule PM_{2.5} and PM₁₀ Amendments; Final Rule", March 24, 2010, 75 FR 14260.

³ "40 CFR 93 Transportation Conformity Rule Restructuring Amendments; Final Rule", March 14, 2012, 77 FR 14979.

consulted our document “Guidance for Developing Transportation Conformity State Implementation Plans (SIPs),” EPA-420-B-09-001, dated January, 2009.⁴

Our review and conclusions regarding the revisions to Regulation No. 10 are detailed in a memorandum in the docket and include the following:

- (a) Section I “Requirement to comply with the Federal rule.” EPA has reviewed and finds satisfactory the revisions to section I of Regulation No. 10. Section I states that the consultation procedures described in section III address the requirements in 40 CFR 93.105(a) through (e), that the provisions in section IV address the requirements in 40 CFR 93.122(a)(4)(ii), and that the provisions in section V address the requirements in 40 CFR 93.125(c).
- (b) Section II “Definitions.” EPA has reviewed and finds acceptable the revisions and clarifications that the State made to several definitions in section II of Regulation No. 10.
- (c) Section III “Interagency Consultation.” For section III we note that 40 CFR 51.390(b) provides that each state is required to address three specific sections in EPA’s transportation conformity rule in 40 CFR Part 93, Subpart A. The relevant provisions that are required to be addressed are: 93.105 (Consultation), 93.122(a)(4)(ii) (Procedures for determining regional transportation-related emissions), and 93.125(c) (Enforceability of design concept and scope and project-level mitigation and control measures). The following is a summary of the key aspects of Regulation No. 10 to address the above requirements, with our evaluation and conclusion of each:

- (1) 40 CFR 93.105, "Consultation," contains five subsections, (a) through (e). In summary, the general provisions of 93.105(a) state that a conformity SIP shall include procedures for interagency consultation, conflict resolution, and public consultation. Subsection 93.105(b) provides general requirements and factors for well defined

⁴ See: <http://www.epa.gov/otaq/stateresources/transconf/policy/420b09001.pdf>

interagency consultation procedures in the implementation plan. Organizations such as metropolitan planning organizations (MPO), state and local air quality planning agencies, and state and local transportation agencies with responsibilities for developing, submitting or implementing provisions of an implementation plan must consult with each other. These organizations must also consult with local or regional offices of EPA, the Federal Highway Administration (FHWA), and the Federal Transit Administration (FTA). The provisions of 93.105(c) detail specific processes that must be addressed in interagency consultation procedures. The provisions of 93.105(d) require specific procedures for resolving conflicts, and the provisions of 93.105(e) require specific public consultation procedures.

EPA has concluded that the above requirements are satisfactorily addressed in the revisions to Regulation No. 10 in section III “Interagency Consultation” which includes; section III.A “Roles and Responsibilities for Transportation Conformity Determinations and Related SIP Development,” section III.B “Establishing a Forum for Regional Conformity Consultation,” section III.C “Topics for Consultation,” section III.D “Process for assuming the location and design concept and scope of projects disclosed to the MPO as required by paragraph (E) of this section, but whose sponsors have not yet decided these features in sufficient detail to perform the regional emissions analysis according to the requirements of 40 CFR 93.122,” section III.E “Process to ensure that plans for construction of regionally significant projects which are not FHWA/FTA projects (including projects for which alternative locations, design concept and scope, or the no-build options are still being considered), including those by recipients of funds designated under Title 23 U.S.C. or the Federal Transit Act , are disclosed on a regular basis, and to

ensure that any changes to those plans are immediately disclosed,” section III.F

“Consultation procedures for development of State Implementation Plans,” section III.G

“Agreements further describing consultation procedures,” and section III.H “Review of Conformity Determinations by the public, Air Quality Control Commission, and resolution of conflicts.”

(2) 40 CFR 93.122(a)(4)(ii) requires enforceable written commitments for emission reduction credits. Emissions reduction credits from any control measures that are not included in the transportation plan and TIP, and do not require a regulatory action in order to be implemented, may not be included in the emissions analysis unless the conformity determination includes written commitments for implementation from the appropriate entities. EPA has concluded that this requirement is satisfactorily addressed in section IV “Emission reduction credit for certain control measures” of Regulation No. 10.

(3) 40 CFR 93.125(c) addresses the enforceability of design concept and scope and project-level mitigation and control measures. Before a conformity determination is made, written commitments must be obtained for any project-level mitigation or control measures. EPA has concluded that this requirement is satisfactorily addressed in section V “Enforceability of design concept and scope and project-level mitigation and control measures” of Regulation No. 10.

(d) Section VI “Statements of Basis, Specific Statutory Authority, and Purpose.” EPA notes this section VI in the State’s regulation merely provides information for the State regarding the SIP revision and is not necessary for an approvable Transportation Conformity Consultation SIP element revision whose purpose is to meet the requirements of CAA section 176(c)(4)(E) and 40 CFR 51.390. Therefore, EPA is not taking any action on this section.

(e) The May 11, 2012 revision removes former Part A, “Determining Conformity of General Federal Actions to State or Federal Implementation Plans,” from the SIP. After amendments to 40 CFR 51.851 that EPA promulgated on April 5, 2010 (75 FR 17254), provisions governing general conformity are now an optional component of a SIP. The State’s removal of Part A is thus consistent with the 2010 amendments. With the removal of Part A from the SIP, the federal rules in Subpart B of 40 CFR Part 93 will directly govern conformity of general federal actions.

IV. Consideration of Section 110(1) of the Clean Air Act

Section 110(1) of the CAA states that a SIP revision cannot be approved if the revision would interfere with any applicable requirement concerning attainment and reasonable further progress towards attainment of a NAAQS or any other applicable requirement of the CAA. EPA has concluded that the above-described revisions to Regulation No. 10 will not interfere with attainment, reasonable further progress, or any other applicable requirement of the CAA.

V. Final Action

EPA is approving the May 11, 2012 SIP revision that was submitted by Christopher E. Urbina, Executive Director of the Colorado Department of Public Health and Environment, and on behalf of the Governor of the State of Colorado. The May 11, 2012 revision updates sections I, II, III, IV, V of Regulation Number 10 “Criteria for Analysis of Conformity” of the Colorado SIP so as to meet the federal transportation conformity consultation requirements under section 176 of the CAA and 40 CFR 51.390(b), 40 CFR 93.105(a) through (e), 40 CFR 93.122(a)(4)(ii), and 40 CFR 93.125(c). EPA is also approving the removal of former Part A, “Determining Conformity of General Federal Actions to State or Federal Implementation Plans,” from the SIP. EPA notes that revisions were also made to Colorado’s Regulation Number 10, section VI “Statements of Basis, Specific Statutory Authority, and Purpose”; however, EPA is not taking

any action on the revisions to this section. EPA's approval of the State's May 11, 2012 revisions to Regulation Number 10 eliminates the need for EPA to take action on the State's June 18, 2009 revisions to Regulation Number 10.

VI. Statutory and Executive Order Reviews

Under the Clean Air Act, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. Accordingly, this action merely approves state law as meeting federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104-4);
- Does not have federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks

subject to Executive Order 13045 (62 FR 19885, April 23, 1997);

- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

The Congressional Review Act, 5 U.S.C. 801 et seq., as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the Federal Register. A major rule cannot take effect until 60 days after it is published in the Federal Register. This action is not a “major rule” as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by [insert date 60 days from date of publication of this document in the Federal Register]. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See CAA section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, and Volatile Organic Compounds.

Authority: 42 U.S.C. 7401 *et seq.*

Dated: January 8, 2014.

Howard M. Cantor,
Acting Regional Administrator,
Region 8.

For the reason stated in the preamble, the Environmental Protection Agency amends 40 CFR part 52 as follows:

PART 52 - APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 et seq.

Subpart G - Colorado

2. Amend § 52.320 by revising paragraph (c)(92) to read as follows:

§ 52.320 Identification of plan.

* * * * *

(c) * * *

(92) On May 11, 2012, Colorado submitted a revision to its State Implementation Plan (SIP) that addresses updates to Colorado's Regulation Number 10, Criteria for Analysis of Conformity, of the Colorado SIP. EPA is approving the May 11, 2012 revisions to Regulation No. 10 that update sections I, II, III, IV, and V so as to meet federal transportation conformity consultation requirements. EPA is also approving the removal of former Part A, Determining Conformity of General Federal Actions to State or Federal Implementation Plans, from the SIP.

(i) Incorporation by reference.

(A) Colorado's Regulation Number 10, Criteria for Analysis of Conformity, except section VI, Statements of Basis, Specific Statutory Authority, and Purpose, as adopted by the Colorado Air Quality Control Commission on December 15, 2011 and state effective on January 30,

2012.* * * * *

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